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March 9, 2009

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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Petitions for Declaratory Ruling Regarding Public, Educational and Governmental Access Channels*, MB Docket No. 09-13; Case ID Nos. CSR-8126, CSR-8127, CSR-8128

Dear Ms. Dortch:

Bright House Networks ("Bright House") is committed to providing its subscribers in Florida and elsewhere with access to public, educational and government channels ("PEG channels") on its cable systems. However, two central Florida communities, Flagler County and the City of Kissimmee ("the communities"), have complained in this proceeding that Bright House has moved PEG programming off of the "basic tier" by carrying it on digital rather than analog channels. <sup>1/</sup>

These communities' complaints are misguided for a number of reasons. As an initial factual matter, PEG programming in these communities remains on Bright House's lowest-priced tier of cable service. The change that the communities disapprove of is that, as a means of providing more channels and enhanced services to its "basic" cable subscribers, Bright House has created a lowest-priced service tier that consists of some digital and some analog channels. In Kissimmee, BHN's lowest-priced service tier has 46 channels – 22 analog and 24 digital. Meanwhile, in Flagler County, Bright House's lowest-priced service tier consists of 43 channels – 22 analog and 21 digital. In both places, PEG programming is carried on digital channels on the lowest-priced service tier, and

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<sup>1/</sup> See Letter From Milissa Holland, Chair, Flagler County Board of County Commissioners, to Joseph Van Eaton, dated March 2, 2009; Letter to FCC from Carla Banks, Manager of Communications, City of Kissimmee, dated Feb. 17, 2009.

subscribers without a digital television or a digital-to-analog converter box of their own may rent a converter from the cable system for one dollar per month.

Consequently, the communities' complaint that Bright House has removed PEG programming from its "basic" tier of cable service is incorrect. Bright House's lowest-priced service tier consists of analog *and* digital channels, and PEG programming is transmitted on the digital channels as part of that tier.

But even more fundamentally, these communities' disagreement with how Bright House is providing its subscribers with access to PEG programming rests on an apparent misapprehension of Bright House's obligations to provide subscribers with access to PEG programming on a regulated "basic tier." Indeed, they even fail to appreciate that the transition to television signals delivered in digital rather than analog format which gives rise to their complaints is simply the next step in the steady march of technological advancements in video communications. These advancements have always worked to the ultimate benefit of consumers, but they have not always been seamless and without some inconvenience.

**I. Unregulated Cable Operators Are Not Obligated To Carry PEG Programming On A "Basic Tier" Under Federal Law.**

To begin with, the Florida communities that complain about Bright House's realignment of PEG programming to digital channels fundamentally misunderstand the nature of cable operators' obligation to place PEG channels on a "basic" tier of cable service. That requirement stems from Section 543(b)(7)(A) of the Communications Act, which was enacted as part of the Cable Television Consumer Protection and Competition Act of 1992. See Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"). The 1992 Cable Act expressly aimed to "promote the availability to the public of a diversity of views and information" by "rely[ing] on the marketplace, to the maximum extent feasible" and to protect consumer interests "where cable television systems are not subject to effective competition." 47 U.S.C. § 521 note (b)(1)-(2) & (4). Accordingly, Congress installed a regulatory regime that "looked first to the marketplace as the source of rate discipline, and only secondarily to government regulation." *Time Warner Entm't Co. L.P. v. FCC*, 56 F.3d 151, 188 (D.C. Cir. 1995) (Congress "expressed a clear preference for competition rather than rate regulation.").

Congress's emphasis on a market-based – rather than governmental – solution to promoting a diversity of programming on cable systems is reflected in Section

543, the only vehicle for regulation at any level of a cable operator's rates, <sup>2/</sup> including charges for converter boxes. <sup>3/</sup> In Section 543, Congress also established distinct categories of cable services, the lowest being the "basic service tier." See *id.* § 543(a)(1), (b) & (f)(2). That tier must contain, "at a minimum," local broadcast channels and any PEG channels required under a cable franchise agreement. See *id.* § 543(b)(7)(A)(i)-(iii). Congress recognized that some cable subscribers would need converter boxes even to receive this basic programming. See *id.* § 543(b)(3).

Before a governmental authority is empowered to regulate any cable operator under Section 543, however, it must be "certified" to do so by this Commission. See *id.* § 543(a)(2)-(6). In order to obtain that certification, the authority must confirm that it does not seek to regulate a cable operator that faces "effective competition." See 47 C.F.R. § 76.910(b)(4); see also *id.* § 76.905 ("Only the rates of cable systems that are not subject to effective competition may be regulated."). The requirements of Section 543 – including subsection (b)(7)(A)'s obligation to provide PEG channels on the "basic tier" – do not apply to cable systems that are subject to "effective competition." <sup>4/</sup> Section 543 could not be any clearer on this point: "If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system *shall not be subject to regulation by the Commission or by a State or franchising authority under this section.*" 47 U.S.C. § 543(a)(2) (emphasis added). <sup>5/</sup> Accordingly, a cable operator that faces effective competition does not have to carry PEG programming on its "basic" tier of service – it is not regulated at all under Section 543.

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<sup>2/</sup> See 47 U.S.C. § 543(a)(1) ("No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section . . ."); see *Time Warner*, 56 F.3d at 188 (Section 543 "prohibit[s] the Commission, states, and local governments from regulating rates other than as provided in the statute.").

<sup>3/</sup> See 47 U.S.C. § 543(b)(3) ("The regulations prescribed . . . under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for . . . installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box . . .").

<sup>4/</sup> See *Time Warner*, 56 F.3d at 188 ("Congress expressly exempted the rates of all systems facing 'effective competition' from regulation by the Commission or a franchising authority 'under this section.'").

<sup>5/</sup> "Effective competition" is defined to include a cable system within a franchise area that is "served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area" and where more than 15 percent of the households "subscrib[e] to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor." 47 U.S.C. § 543(f)(1)(b).

The federal District Court for the Middle District of Florida, in a case brought against Bright House by the cities of St. Petersburg and Tampa, recently confirmed that cable operators that face effective competition are not constrained to place PEG channels on a basic service tier. The cities alleged in their lawsuit that Bright House violated federal law – namely, Section 543 – by relocating PEG programming from analog to digital channels on its lowest-priced tier of service. As in Flagler County and Kissimmee, that tier contained some analog and some digital channels. The District Court rejected the cities' argument and granted summary judgment in Bright House's favor. See *City of St. Petersburg v. Bright House Networks, LLC*, 2008 WL 5231861 (MD. Fla. 2008). As the court explained, "[u]nder the plain terms of the statute, § 543(b)(7)(A) does not apply to BHN in St. Petersburg and Tampa because the FCC has found that BHN is subject to effective competition in those areas." *Id.* at \*3. <sup>6/</sup>

The Commission has determined that Bright House is subject to effective competition in Kissimmee and accordingly revoked its regulatory authority under Section 543. See *HPI Acquisition Co., LLC d/b/a Charter Communications, et al.*, 19 F.C.C.R. 12,201, 12,204, ¶¶ 6-7 (Media Bur. 1994).

## **II. Florida Law Expressly Authorizes Any Cable Operator To Carry PEG Programming On Its Lowest Digital Tier Of Service.**

In addition to mistaking federal law, the communities' complaints about Bright House's relocation of PEG programming to digital channels on its lowest-priced service tier also ignore the fundamental change wrought in Florida law by the Consumer Choice Act of 2007 (the "CCA" or "Act"). See 2007 Fla. Sess. Law Serv. Ch. 2007-29; see also *Capital Infrastructure, LLC v. Hernando County*, 2007 WL 3202678, at \*2 (M.D. Fla. 2007). The CCA vests the Department of State, rather than local governments, with authority over cable regulation. <sup>7/</sup> Thus, as part of the CCA, incumbent cable operators like Bright House can opt into "a state-issued certificate of franchise authority." Fla. Stat. Ann.

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<sup>6/</sup> This Commission, too, has made clear that Section 543's regulation of programming contained on a basic service tier does not apply to cable operators that face effective competition and are therefore unregulated. See *Carriage of Digital Television Broad. Signals*, 16 F.C.C.R. 2598, 2642-43, ¶¶ 101-102 (2001) (recognizing that Section 543(b)(7) "is one of those rate regulation requirements that sunsets once competition is present in a given franchise area"); see also *Flinn Broad. Corp. v. Knology Cable*, 18 F.C.C.R. 1680 (Media Bur. 2003) ("A finding of effective competition permits a cable operator to price and market its services according to market forces, rather than pursuant to the provisions of Section [543] of the Act.").

<sup>7/</sup> See Fla. Stat. Ann. § 610.102 ("The department shall be designated as the franchising authority for a state-issued franchise for the provision of cable or video service. A municipality or county may not grant a new franchise for the provision of cable or video service within its jurisdiction."); see *id.* § 610.104 (state authorization to provide cable or video service).

§ 610.105(1). And once an incumbent cable operator exercises that option, its pre-existing “municipal or county franchise is terminated” and it is accordingly relieved of “any obligation under any existing municipal or county franchise that exceeds the obligations imposed” by the CCA. *See id.* § 610.105(2); *see also id.* § 610.114(1).

Bright House received a state-issued certificate of franchise authority covering Flagler County on July 2, 2007. *See id.* § 610.105(1). Accordingly, because Flagler County is no longer a franchising authority for Bright House and its franchise has been terminated as a matter of law, the county is without any authority to regulate Bright House’s rates or the content of Bright House’s “basic” tier. *See id.* § 610.105(2). That role has now been vested with the Florida Department of State, and Flagler County cannot seek to impose any requirement on Bright House that exceeds those of the CCA.

The CCA also expressly addresses the issue of PEG programming carried on cable systems. It provides that a “cable or video service provider may locate any public, educational, or governmental access channel *on its lowest digital tier of service offered to the provider’s subscribers.*” *Id.* § 610.109(6) (emphasis added). There is no ambiguity about the meaning of this provision. As the District Court explained in *City of St. Petersburg*, it means that “any cable operator – not only state-franchised certificateholders – may place PEG programming on its lowest-priced digital service tier.” 2008 WL 5231861, at \*5 (emphasis in original).

Just as the District Court concluded in *City of St. Petersburg*, Bright House’s relocation of these Florida communities’ PEG programming to digital channels on its lowest-priced tier of service is fully consistent with governing Florida law. As in *City of St. Petersburg*, these communities simply complain about Bright House doing something expressly authorized by state law. *See id.* (“The CCA expressly permits the very thing that the Cities complain that BHN has done – locating government access channels ‘on its lowest digital tier of service’”) (quoting Fla. Stat. Ann. § 610.109(6).)

### **III. The “Digital Transition” – Like Other Technological Advancements In Video Services – Is Not A Seamless Revolution.**

While the communities complain that Bright House’s relocation of PEG programming to digital channels has inconvenienced some of their residents without digital televisions or digital-to-analog converter boxes, they fail to appreciate that Bright House’s channel realignment is part of the ongoing nationwide transition from analog to digital television signals. That transition

carries significant benefits for consumers, <sup>8/</sup> and is a national policy objective mandated by federal law. See 47 U.S.C. § 309(j)(14).

That the current digital revolution may inconvenience some cable subscribers should come as no surprise. The video services market has witnessed profound technological developments over the years, and these changes have not always come easy. What started with black and white television sets only capable of receiving analog very high frequency (“VHF”) signals from over-the-air broadcast stations <sup>9/</sup> evolved into television sets capable of receiving color programming as well as ultra high frequency (“UHF”) analog signals. <sup>10/</sup> Later, in the 1950s, “community antenna television systems” – a.k.a. cable systems – emerged as a means of enhancing the reception of over-the-air broadcast signals in remote areas, but quickly expanded to offer subscribers in urban areas more programming channels than could be received over the air. <sup>11/</sup> And today, the analog signals historically used by over-the-air television broadcasters and cable operators are being replaced by digital television signals that greatly expand the range of communications services available over the air and through cable systems.

These technological developments have not come without glitches. The reason: Video service providers’ deployment of innovative transmission technologies has historically outpaced consumers’ purchases of new television reception equipment capable of receiving the advanced technology. Ever since the inception of cable television, cable operators and their subscribers have relied on set-top converter boxes to bridge this ever-present technological disconnect. For but one example, when cable operators began to carry UHF television signals, subscribers who did not have UHF “cable-ready” television sets needed set-top

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<sup>8/</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 693 (D.C. Cir. 2005) (explaining that digital signals allow the broadcast of “extremely high quality video programming signal[s] (known as high definition television) or multiple streams of video, voice, and data simultaneously within the same frequency band traditionally used for a single analog television broadcast”); see also *Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv.*, 11 F.C.C.R. 17,771, 17,774 (1996); *Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv.*, 10 F.C.C.R. 10,540, 10,541, ¶ 4 (1995).

<sup>9/</sup> The FCC authorized the use of “VHF” channels (Channels 2-13) in 1941. See *Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 F.C.C.2d 840, ¶ 21 (1977).

<sup>10/</sup> In 1952, the FCC allocated communities both VHF and UHF television channels. See *Springfield Television of Utah v. FCC*, 710 F.2d 620, 622 (10th Cir. 1983). VHF stations could be received on channels 2 through 13. See *id.* Meanwhile, UHF stations could be received on channels 14 through 83. See *id.*

<sup>11/</sup> See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 21-22 (D.C. Cir. 1977).

converter boxes to view UHF programming. <sup>12/</sup> And subscribers with televisions capable of receiving UHF and VHF signals still needed converter boxes to view analog programming the cable system offered on other channels. <sup>13/</sup> This was the environment in existence when the Cable Act was enacted in 1984 and amended in 1992; it was understood that converter boxes would be required by some cable subscribers to receive PEG programming.

Even today, Bright House's current subscribers who do not have "cable ready" television sets must use a converter box in order to receive some analog programming transmitted over its cable systems. Additionally, Bright House subscribers who have not obtained a digital cable-ready television also need a digital converter box to view digital programming because programming in that format cannot be viewed without a cable-ready television or a digital-to-analog converter box. And in order to ease the transition to digital programming, Bright House has offered subscribers of its lowest-priced tier of cable service the option of renting a digital-to-analog converter box for one dollar per month.

The technological disconnect between the delivery format of television signals and the capabilities of the reception equipment viewers have in their homes is not limited to cable subscribers. As the Commission is well aware, once the federally-mandated transition to digital over-the-air television broadcasts finally takes place later this year, viewers without digital television receivers will be unable even to receive "free" over-the-air television signals without obtaining a digital-to-analog converter box. <sup>14/</sup>

While the communities may prefer that Bright House's PEG programming remain in analog format so some of their residents need not upgrade their television reception equipment or obtain digital-to-analog converter boxes, their complaints simply ignore the reality that technological advancements in the video services market have historically required consumers to adopt new equipment to fully

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<sup>12/</sup> See *Monterey Peninsula TV Cable Salinas*, 98 F.C.C.2d 310, available at 1984 WL 251087, \*1 (1984) (acknowledging cable subscribers' use of converters to access UHF channels). Before Congress required television sets to contain UHF tuners, "viewers without a UHF converter had no access at all to UHF programming." *Table of Television Channel Allotments*, 83 F.C.C.2d 51, available at 1980 WL 121404, \*17 (1980).

<sup>13/</sup> See generally *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 707 (D. Del. 1998) (explaining a cable "converter box permits an older model television set, which can receive only a finite number of VHF or UHF channels, to receive the larger number of channels transmitted by cable systems").

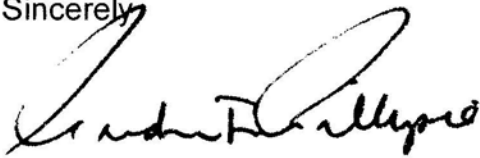
<sup>14/</sup> See FCC, FAQs – Consumer Corner, at <http://www.dtv.gov/consumercorner.html> (explaining that, after digital transition, "if you have an analog television, you will need a digital-to-analog converter box to continue to watch broadcast television on that set").

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enjoy the benefits of those advancements. And they also overlook that, as the District Court pointed out in *City of St. Petersburg*, Bright House's "realignment of the PEG channels is an inevitable step in the transition from video signals delivered in analog form to ones delivered in digital form." See 2008 WL 5231861, at \*5.

Bright House recognizes that this digital transition can be difficult for some of its customers and the communities they live in, and it has been working hard to ensure that the transition is as smooth as possible. It will continue to do so.

Sincerely,

A handwritten signature in black ink, appearing to read "Gardner F. Gillespie". The signature is fluid and cursive, with a large initial "G" and a long, sweeping underline.

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*Counsel to Bright House Networks, LLC*

**CERTIFICATE OF SERVICE**

I, Paul Werner, hereby certify that on this 9th day of March, 2009, I have placed in the United States mail, and/or sent via electronic mail, a copy of the foregoing letter, with sufficient postage (where necessary) affixed thereto, upon the following:

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